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No.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

WILLIAM E. JONES and GLADYS A. JONES, husband and wife, and ACME MEAT COMPANY, INC., an Arizona corporation,

PETITIONERS,

v.

PRESCOTT A. BERRY, District Director, Internal Revenue Service; DAVID C. ARNELL, Chief, Criminal Investigation Division, Internal Revenue Service; BERNICE YOST, Group Manager, Criminal Investigation Division, Internal Revenue Service; JOHN M. MANNING, Special Agent, Criminal Investigation Division, Internal Revenue Service; JAMES E. MASON, Special Agent, Criminal Investigation Division, Internal Revenue Service; JOHN DOE I-X, inclusive; and JANE DOE I-X, inclusive,

RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether a warrantless, surreptitious investigation of William and Gladys Jones and Acme Meat Company by undercover Internal Revenue Service agents posing as prospective purchasers of the business, which elicited disclosure of incriminating business records, constituted an unreasonable search violative of the fourth amendment.

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RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

William E. and Gladys A. Jones, and Acme Meat Company, Inc., petition for a

writ of certiorari to review the opinion of the United States Court of Appeals for the Ninth Circuit in this action.

OPINIONS BELOW

The opinion of the court of appeals (App. B, infra, B-1 - B-24) is reported unofficially at 83-2 U.S. Tax Cas. (CCH) ¶ 9563. The opinion of the district court (App. A, infra, A-1 - A-40) is reported at 524 F. Supp. 645.

JURISDICTION

The opinion of the court of appeals was filed on October 24, 1983. A timely petition for rehearing was denied on December 20, 1983. (App. C, infra, C-1 - C-2) No extension of time within which to file a petition for certiorari has been requested. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The fourth amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

1. In May of 1977, I.R.S. Special Agent John Manning requested approval for an undercover operation known as the Business Opportunities Project (BOP), designed to discover tax fraud by penetrating businesses offered for sale. (App. B at B-2 - B-3.) By posing as prospective purchasers, I.R.S. special agents would gain the confidence of business sellers and attempt to elicit documentary evidence of "skimming" (diverting

income from ordinary bookkeeping channels and not reporting the income for tax purposes) for use in subsequent criminal prosecutions. (App. B at B-3, n. 1.) The project was approved by the Arizona District I.R.S. Director in June of 1977. After initial disapproval, the project received qualified approval by the National Director in January of 1981. Prior to undercover contact with sellers, the National Director required that two express conditions be satisfied: first, that there be "[A] reasonable basis to believe that the taxpayer offering the business for sale has understated the reported net profit of the business. . ." and next, that "[T]he [tax] returns of the business do not reflect a realistic picture when compared with the asking (selling) price." (App. B at B-3, n. 2.)

2. Special Agent Manning initiated the BOP investigation at issue in January of 1981 by responding to a classified newpaper advertisement. On January 10, 1981, he visited the listing business broker and stated that he and an undisclosed partner intended to purchase a business in the Phoenix area. (App. B at B-3.) Without openly discussing skimming, Manning communicated by hand gestures and veiled suggestions that he was particularly interested in businesses with a cash flow susceptible to skimming. (App. B at B-4.) The broker responded that he knew of an unnamed business that might suit Manning's purposes, but never discussed whether skimming was actually occurring. (App. B at B-4.)

3. On February 7, 1981, Manning again met with the broker at his business office and sought further information.

(App. B at B-4.) The broker then identified the business as Acme Meat Company, a Phoenix wholesale meatpacking operation. After Manning executed a confidentiality agreement, providing that Manning would not disclose information except to seek professional advice, the broker allowed Manning to examine Acme Meat Company's corporate income tax returns for the fiscal years 1976, 1977, and 1978. (App. B at B-4.) Manning and the broker then toured the premises of Acme Meat Company and met with its owner, William E. Jones. (App. B at B-4 - B-5.) Manning's discussion with Jones regarding skimming did not go beyond hints and suggestions, but Manning gained the impression that Jones was skimming through "[A]n informal meeting of the minds." (App. B at B-5; App. A at A-5.) Manning reaffirmed his ostensible interest in purchasing the business and

requested the opportunity to review its books and records. (App. B at B-5.)

4. On February 18, 1981, Manning spoke with the broker on the telephone to arrange their next meeting. During conversation, the broker asked Manning, "Are you sure you are not from the I.R.S.?" Manning laughed and said nothing. (App. A at A-5.)

5. On April 4, 1981, Manning met with William Jones and Gladys A. Jones, his wife, at the Joneses' personal residence. Manning examined at length the cash receipts and disbursements ledger, the general corporate ledger, invoices and various other business records. (App. B at B-5.) Though he found no documentable proof of unreported income, as required by the BOP guideleines, he persisted and requested another meeting to introduce the business to his supposed partner. (App. B at B-5.)

6. On April 25, 1981, Manning and his partner, Special Agent James E. Mason, met William Jones at the Acme Meat Company factory. (App. B at B-6.) Manning and Mason had previously decided to adopt a "good guy-bad guy" strategy, where Manning would feign interest in purchasing while Mason would express reluctance and take a "show me" attitude. (App. A at A-6.) After touring the plant, Mason stated that he would not purchase the business unless Jones could provide records demonstrating skimmed income. (App. B at B-6.) Jones thus led the agents to his home, where his wife produced substantiating records. (App. B at B-6.) The agents then left, promising to inform the Joneses promptly of their decision. (App. B at B-6.)

8. The agents promptly decided that they now had probable cause to justify issuance of a search warrant.

On May 1, 1981, a search warrant based on evidence discovered during the April 25 meeting was issued by a United States Magistrate. (App. A at A-9.) The house was searched that day, as well as a second residence owned by the Joneses pursuant to consent given by Mrs. Jones during the course of the search. (App. B at B-7.) Though the search warrant described five specific items of evidence, sixteen boxes containing over three thousand items of records, papers, and miscellaneous supplies were seized. (App. A at A-28, n. 3; App. B at B-7.)

9. After making two requests for return of all seized items, the Joneses and Acme Meat Company filed a petition on May 27, 1981, seeking suppression and return of their records. (App. B at B-7.) The district court exercised jurisdiction under rule 41(e), Federal Rules of Criminal Procedure, and the

inherent equitable jurisdiction of the court. (App. A at A-13 - A-14.) Finding after evidentiary hearing that the search warrant was based on information obtained as a result of an unreasonable undercover search in violation of the fourth amendment, the district court suppressed all evidence seized. (App. A at A-26.) On appeal, the Ninth Circuit reversed and remanded.[1]

REASONS FOR GRANTING THE PETITION

This case presents significant questions regarding the expanding use of surreptitious searches for evidence of criminal tax evasion by undercover special agents of the Internal Revenue

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[1] The court of appeals (App. B at B-7, n. 3) agreed with the district court (App. A at A-30 - A-31) that items seized in excess of those described in the search warrant must be returned to the Joneses and remanded for further findings on this issue.

Service. Furthermore, the rationale employed by the court of appeals broadly insulates such covert operations from constitutional scrutiny under the misplaced confidence doctrine announced in Hoffa v. United States, 385 U.S. 293 (1966). Absent intervention by this Court, deceit will guarantee a safe harbor against fourth amendment scrutiny to the entire range of federal, state and local law enforcement agencies. The court of appeals itself (App. B at B-16) appreciated the horrendous implications of this Orwellian scenario:

> Democratic governments are based on a relationship of trust between government and the governed. If the possibility exists that the next acquaintance one makes may be a governmental agent conducting a hidden investigation unjustified by any indication of wrongdoing, every relationship will be tainted by suspicion and fear.

Petitioners submit that certiorari jurisdiction is appropriate under

guidelines set forth in rule 17(a) and (c), Rules of the United States Supreme Court, on the following grounds: (1) the decision of the Ninth Circuit at issue is in direct conflict with the Fifth Circuit's holding in United States v. Tweel, 550 F.2d 297 (5th Cir. 1977); (2) the Ninth Circuit's decision misapplies the fourth amendment analysis announced by this Court in Katz v. United States, 389 U.S. 347 (1967).

1(a). In United States v. Tweel, 550 F.2d 297 (5th Cir. 1977), the defendant appealed from conviction on counts including income tax evasion for the trial court's refusal to supress evidence secured by a deceptive I.R.S. investigation, on the following facts.

A revenue agent from the I.R.S. civil audit division contacted the defendant's accountant, requesting access to records for an audit of

Tweel's income tax returns. Due to a special agent's participation in a previous audit of Tweel, the accountant inquired whether a special agent was involved in this investigation. The revenue agent responded that no special agent was involved, leading the accountant to believe that only a civil audit was intended. The revenue agent did not disclose that he was participating in a criminal investigation at the specific request of the Organized Crime and Racketeering Section of the Department of Justice. The accountant then voluntarily surrendered his client's records to aid in the audit, which were used as evidence in securing conviction.

Relying on a line of precedent[2] holding that consent searches are unreasonable under the fourth amendment if consent is induced by deceit, trickery or misrepresentation by Internal Revenue agents, the Fifth Circuit held that the consent to review the taxpayer's records was obtained in violation of the fourth amendment since it was secured by the deception of an I.R.S. agent:

> From the facts we find that the agent's failure to apprise the appellant of the obvious criminal nature of this investigation was a sneaky deliberate

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[2] United States v. Rothstein, 530 F.2d 1275 (5th Cir. 1976); United States v. Dawson, 486 F.2d 1326 (5th Cir. 1973); United States v. Bland, 458 F.2d 1 (5th Cir. 1972), cert. denied, 409 U.S. 843 (1972); United States v. Ponder, 444 F.2d 816 (5th Cir. 1971), cert. denied, 405 U.S. 918 (1972); United States v. Tonahill, 430 F.2d 1042 (5th Cir. 1970), cert. denied, 400 U.S. 943 (1970); United States v. Prudden, 424 F.2d 1021 (5th Cir. 1970), cert. denied, 400 U.S. 831 (1970).

> deception by the agent under the above standard and a flagrant disregard for appellant's rights. The silent misrepresentation was both intentionally misleading and material.
>
> . . . .
>
> We cannot condone this shocking conduct by the IRS. Our revenue system is based upon the good faith of the taxpayers and the taxpayers should be able to expect the same from the government in its enforcement and collection activities.

United States v. Tweel, 550 F.2d at 299-300 (citations and footnotes omitted).

(b). In the instant case, the district court followed United States v. Tweel, 550 F.2d 297, in entering its order that all items seized from the Joneses be returned and supressed as evidence. The district court first found that the actions of Special Agents Manning and Mason in meeting with the Joneses were intended solely to discover

evidence of criminal conduct by the Joneses. (App. A at A-18.) The April 4 and April 25, 1981, meetings were thus held to be searches within the meaning of the fourth amendment:

> As the Court observed in Haerr v. United States, 240 F.2d 533, 535 (5th Cir. 1957): "A search implies an examination of one's premises or person with a view to the discovery of contraband or evidence of guilt to be used in prosecution of a criminal action. The term implies exploratory investigation or quest."

(App. A at A-21.)

The district court next held that the reasonableness of warrantless searches during undercover operations turns on the particular circumstances of each case, citing Lewis v. United States, 385 U.S. 206, 208 (1966). Resting squarely on the holding in United States v. Tweel, 550 F.2d 297, the district court found that Special Agents Manning and Mason induced the

Joneses to consent to a surreptitious search of their records by the use of deceit and misrepresentation in violation of the fourth amendment:

> This Court believes that the conclusion in Tweel is equally appropriate in this case . . . . Indeed, the facts of this case present an even more egregious intrusion on the rights of petitioners since they did not know Manning and Mason were associated with the IRS, whereas the appellant in Tweel was at least aware that he was dealing with agents he thought were engaging in routine civil audit.

(App. A at A-20.)

The district court thus concluded that the search warrant at issue was based on evidence obtained as a result of an illegal search, requiring suppression as fruit of the poisionous tree under Alderman v. United States, 394 U.S. 165, 177 (1969). (App. A at A-25.)

(c). In reversing the district court, the Ninth Circuit attempted to

distinguish the case at bar from United States v. Tweel, 550 F.2d 297, and its predecessors, by contrasting misrepresentation by known I.R.S. agents at issue in Tweel against misrepresentation by agents who entirely conceal that they act on behalf of the government:

> The district court relied principally on the Fifth Circuit's decision in United States v. Tweel, 550 F.2d 297 (1977), to conclude that a violation of the fourth amendment occurred in this case. Tweel, however, is distinguishable. There, IRS agents, known to the suspect to be IRS agents empowered to conduct civil audits, abused the voluntary civil tax reporting and investigation system by inducing the suspect to turn over records for a criminal investigation. Thus, they abused the powers of their positions. Here, by contrast, the IRS agents did not pretend to be civil agents, thereby implicitly invoking their powers as civil investigators, when in fact they intended to conduct a criminal investigation. Rather, the agents pretended to be fellow criminals in order to gain the Joneses'

> confidence. Such deception is far different from that practiced in Tweel.

(App. A at B-12, n. 5.)

Petitioners submit that the distinction is legally immaterial. The policy considerations of good faith and voluntary compliance that based the decision in Tweel apply equally to the facts in the case at bar, as the district court (App. A at A-19 - A-20) recognized in its opinion, and nothing in Tweel suggests that the Fifth Circuit would limit its holding to instances of deception by I.R.S. agents who identify themselves as such. The government's freedom to deceive the citizenry in law enforcement activities, and indeed the scope of protections guaranteed under the fourth amendment, would otherwise hinge on the cosmetic consideration of whether the perfidious governmental agent opted to conceal or disclose his badge.

(d). In summary, the Ninth Circuit's decision in the instant case cannot be harmonized with the Fifth Circuit's line of precedent concluding with United States v. Tweel, 550 F.2d 297. Resolution of this conflict is essential. Petitioners are presently aware of a related case challenging the Business Opportunity Program pending before the Eleventh Circuit,[3] and intensified undercover operations by the I.R.S. will likely lead to such litigation in other circuits in the near future. Under rule 17(a), Rules of the United States Supreme Court, petitioners urge the Court to provide guidance by exercising certiorari jurisdiction.

2(a). The Ninth Circuit entered its decision with self-confessed reluctance.

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[3] United States v. Centennial Builders, Inc., No. 83-7524 (11th Cir. brief for appellants filed December 1983).

Though recognizing the challenge to individual liberty posed by such undercover searches without probable cause (App. B at B-15 - B-16), the court considered itself constrained to reverse the district court under the decision in Katz v. United States, 389 U.S. 347 (1967):

> While we agree with the district court that the BOP, even if implemented in conformity with the National Director's requirements, may ultimately be destructive, we reluctantly disagree that such policy concerns can control our decision here. . . .
>
> . . . .
>
> When the Katz standard is applied to the facts presented by this case, we conclude that the IRS activities with respect to the Joneses and Acme Meats, however unwise and shortsighted they may have been, did not constitute a search within the meaning of the fourth amendment.

(App. B at B-11 - B-12.)

Petitioners submit that the policy concerns discounted by the court of

appeals are crucial to analysis of fourth amendment issues and that the Ninth Circuit's application of the standard announced in Katz v. United States, 389 U.S. 347, conflicts with the Court's decision.

(b). The Ninth Circuit's rationale in holding that the I.R.S. activities did not constitute a fourth amendment search may be summarized as follows: (1) under Katz v. United States, 389 U.S. 347 (1967), privacy interests are protected by the fourth amendment where a two-pronged test is met (App. B at B-10); (2) the misplaced confidence doctrine announced in Hoffa v. United States, 385 U.S. 293 (1966), establishes a per se rule that a person has no expectation of privacy in information voluntarily revealed to an undercover agent (App. B at B-14 - B-15); (3) the Joneses fail the first prong of the Katz test

since they disclosed information to undercover agents, who learned nothing that the Joneses did not voluntarily reveal (App. B at B-14, n. 6).

The decision in Hoffa v. United States, 385 U.S. 293, announced on the same day as the decision in Lewis v. United States, 385 U.S. 206 (1966), rested on so-called "trespass analysis" formerly applied in fourth amendment cases. Hoffa expressly relied on the rationale that the fourth amendment protects "the security a man relies on when he places himself or his property within a constitutionally protected area. . . ." 385 U.S. at 301. The Court held that incriminating statements made to a government informer were not protected by the fourth amendment because Hoffa "was not relying on the security of his hotel suite when he made the incriminating statements. . . ." Id. at 302.

Lewis similarly found that fourth amendment protections normally attendant the home as a constitutionally protected area were lost when the residence was used to transact illegal business. 385 U.S. at 211.

Trespass analysis was in theory susceptible of mechanical application; absent waiver under a confusing array of exceptions, certain defined areas were sanctuaries from governmental intrusion. As the court of appeals recognized (App. B at B-9), this Court discarded trespass analysis one year later in Katz v. United States, 389 U.S. 347. Hoffa and Lewis were not thereby overruled--their continued vitality, however, depended on the privacy interest rationale of Katz.

Hoffa and Lewis were harmonized with Katz in United States v. White, 401 U.S. 745 (1971). The Court justified their viability by application of the

two-pronged test set forth in Justice Harlan's concurring opinion: "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" Katz v. United States, 389 U.S. at 361 (Harlan, J., concurring).

The first prong of this standard inquires whether the defendant subjectively expected that disclosures of wrongdoing would be kept from the government. The Court recognized that this will rarely be answered in the negative:

> Our problem is not what the privacy expectations of particular defendants in particular situations may be or the extent to which they may in fact have relied on the discretion of their companions. Very probably, individual defendants neither know nor suspect that their colleagues have gone or will go to the police or are carrying recorders or transmitters. Otherwise, conversations

> would cease and our problem with these encounters would be nonexistent or far different from those now before us.

United States v. White, 401 U.S. at 751-52.

The second prong inquires whether society recognizes the defendant's subjective expectation of privacy as reasonable. Here the Court specifically considered Hoffa and Lewis:

> Our problem, in terms of the principles announced in Katz, is what expectations of privacy are constitutionally "justifiable" - what expectations the Fourth Amendment will protect in the absence of a warrant. So far, the law permits the frustration of actual expectations of privacy by permitting authorities to use the testimony of those associates who for one reason or another have determined to turn to the police, as well as by authorizing the use of informants in the manner exemplified by Hoffa and Lewis.

United States v. White, 401 U.S. at 752.

This altered the application of the misplaced confidence doctrine. Under

trespass theory as applied in Hoffa, the fourth amendment was per se inapplicable where a government agent was invited onto premises which otherwise qualified as a protected area. Under the Katz rule, if the defendant's conduct evidences an expectation that disclosures will not be revealed to the government, the reasonableness of this expectation must be evaluated on an ad hoc basis. Hoffa and Lewis are relevant to this inquiry as guiding principles, but do not control the outcome mechanically.

(c). The Ninth Circuit considered the misplaced confidence doctrine under the first prong of the Katz test:

> The first part of the Katz test asks whether the Joneses exhibited by their conduct an intention to preserve as private the evidence of skimming obtained by the IRS agents. See Smith v. Maryland, 442 U.S. 735, 740 (1979). Pertinent to answering this question are the decisions of the Supreme Court in Hoffa

v. United States, 385 U.S. 293 (1966), and Lewis v. United States, 385 U.S. 206 (1966).

(App. B at B-13 - B-14.)

The court of appeals considered that the Joneses' disclosure of wrongdoing of itself belied any subjective intent to preserve privacy under the first prong of Katz test. (App. B at B-14 - B-15.) The court thus held that Hoffa "compelled the conclusion" that fourth amendment rights were not involved (App. B at B-14) and did not reach the issue of reasonableness under the second prong of the Katz test. Under this interpretation of the misplaced confidence doctrine, judicial inquiry into the justification for or reasonableness of an undercover agent's intrusion in the first instance is foreclosed as a matter of law.[4]

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[4] Extending this argument to the extreme, covert operations by agents posing as lawyers or priests would not be subject to fourth amendment scrutiny.

(d). In common parlance, a fact is no longer private if disclosed to any person; under the fourth amendment, however, privacy enjoys a different meaning. The Court in Katz recognized that privacy in the context of fourth amendment analysis is a term of art, relating specifically to the right to be free from governmental intrusion:

> [T]he Fourth Amendment cannot be translated into a general constitutional "right to privacy." That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all . . . . But the protection of a person's general right to privacy--his right to be let alone by other people--is . . . left largely to the law of the individual States.

Katz v. United States, 389 U.S. at 350-351.

This is illustrated by the facts in Katz. The government there secured incriminating evidence of illegal

wagering by tapping conversations made on a public telephone. The suspect engaged in incriminating conversations with a third person and thus surrendered privacy in the general sense. The Court held, however, that the suspect could nonetheless expect to carry on the conversation free from governmental eavesdropping. The fourth amendment may protect an individual's right to engage in confidential dealings with others; disclosure of incriminating facts to a third person does not automatically destroy fourth amendment privacy expectations or justify government interference.

(e). The numerous progency of Hoffa cited by the court of appeals (App. B at B-13 - B-14) have been slow to recognize Katz--indeed, Katz is cited but once for an unrelated proposition. Their holdings, however, are readily harmonized.

Hoffa v. United States, 385 U.S. 293 (1966), considered a conspiracy to tamper with an empaneled jury. Lewis v. United States, 385 U.S. 206 (1966), considered a narcotics transaction. United States v. Scott, 521 F.2d 1188 (9th Cir. 1975), considered a tax rebellion conspiracy. United States v. Schuster, 684 F.2d 744 (11th Cir. 1982), rehearing granted, 697 F.2d 910 (11th Cir. 1983), considered a transaction in counterfeit currency. United States v. Davanzo, 699 F.2d 1097 (11th Cir. 1983), considered a horse drugging conspiracy. United States v. Lovasco, 431 U.S. 783 (1977), considered a conspiracy to market illegal firearms. In each of these cases, undercover government agents or informers penetrated ongoing illegal transactions. Further, the undercover penetrations were not arbitrary--in each case, some basis existed to believe that

unlawful conduct would occur. These instances fall squarely within the reach of undercover operations traditionally recognized as constitutional:

> Artifice and stratagem may be employed to catch those engaged in criminal enterprises. . . . The appropriate object of this permitted activity, frequently essential to the enforcement of the law, is to reveal the criminal design: to expose the illicit traffic, the prohibited publication, the fraudulent use of the mails, the illegal conspiracy, or other offenses, and thus to disclose the would-be violators of the law.

Sorrells v. United States, 287 U.S. 435, 441-442 (1932) (quoted in Lewis v. United States, 385 U.S. at 209, n. 5).

Furthermore, these cases are consistent with the standard announced in Katz. Presumably suspects in the Hoffa line of cases subjectively expect freedom from governmental interference under the first prong, for they likely would abandon the illegal enterprise if they expected that their partner in crime was

an informer or law enforcement agent. See United States v. White, 401 U.S. at 751-52.

None of these cases, however, meets the second prong of the Katz test. Society does not recognize as reasonable a criminal's expectation that he can engage in illegal transactions without the threat of governmental intrusion; a person who conspires to commit crime has no legitimate complaint if he chooses his co-conspirators poorly.

(f). Petitioners urge that if the Katz standard is properly applied to the facts of this case, the policy concerns which the Ninth Circuit discarded must be entertained in considering reasonableness under the second prong of the Katz test.

The Joneses set out to market their meat packing company by listing the business with a broker. In the ordinary course of such a sale, sensitive business

records must be revealed and privacy in the general sense is lost. The Joneses could nonetheless expect to offer their business without the threat of direct interference by the government.

Applying the first prong of the Katz test, the Joneses evidenced a subjective belief that they could disclose business records without government interference. No disclosures were made until the prospective purchasers had been screened by their broker; records were made available only under a written confidentiality agreement. Indeed, their broker affirmatively questioned whether Special Agent Manning was an I.R.S. agent--Manning laughed and evaded the question. (App. A at A-5.) It is clear that the Joneses never would have cooperated with their "buyers" had they subjectively expected government penetration.

Application of the second prong of

Katz distinguishes the instant case from cases beginning with Hoffa and Lewis. While society has no interest in protecting illegal transactions, it has a substantial interest in protecting commerce and allowing disclosures necessary to convey legal businesses.

This is reflected by rights provided under state law regarding the confidentiality of business records. The Joneses enjoyed trade secret rights in their business records which are entitled to legal protection. See Burden Co. v. Sylk, 389 F. Supp. 847 (E.D. Pa. 1968). Agreements to prevent disclosure of trade secrets, including business records, are valid and enforceable. See Painton & Co. v. Bourns, Inc., 442 F.2d 216 (2d Cir. 1971); Water Services, Inc. v. Tesco Chemical, Inc., 410 F.2d 163 (5th Cir. 1969). Disclosure of such information under an agreement of

confidentiality does not destroy its nature as a trade secret. Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 472 (1974). The Joneses did not open their records to the world; they made selective disclosures in a fashion which society recognizes as reasonable.

Society has little interest, on the other hand, in allowing such undercover operations under our facts. The proposed sale of Acme Meat Company was a lawful transaction; the intent of the I.R.S. agents was not to penetrate ongoing criminal conduct, but to shop for evidence of completed crime. As the court of appeals recognized, the penetration of the business began without any indication of wrongdoing on the Joneses' part. (App. B at B-15 - B-16.) That the I.R.S. can now offer after-the-fact justification for the operation begs the question of whether such governmental intrusion

should be considered reasonable by society in the first instance.

(g). In summary, petitioners submit that the Ninth Circuit misconstrued the scope of privacy interests and misapplied the analytic framework announced in Katz v. United States, 389 U.S. 347, and elaborated in United States v. White, 401 U.S. 475. The result is an untenable constriction of judicial discretion with respect to fundamental rights. Absent correction by this Court, the Ninth Circuit's interpretation of the misplaced confidence doctrine will allow wholesale evasion of the fourth amendment by any law enforcement agent who successfully employs a deceptive guise.[5] Petitioners

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[5] For instance, the Court recently held in Michigan v. Clifford, No. 82-357 (decided January 11, 1984), that a search warrant is required, absent consent or exigent circumstances, to search for criminal evidence of arson on fire-damaged

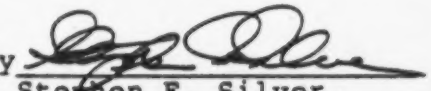
urge the Court to accept certiorari jurisdiction under rule 17(c), Rules of the United States Supreme Court.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED this 19th day of January, 1984.

BURCH & CRACCHIOLO, P.A.

By 

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premises. This requirement could be readily evaded by law enforcement agents who deceitfully secured permission to search, posing as insurance adjusters seeking to estimate damages.

CERTIFICATE OF MAILING

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

STEPHEN E. SILVER, being first duly sworn, upon his oath deposes and says:

That forty (40) copies of the foregoing Petition for Certiorari of Petitioners William E. Jones and Gladys A. Jones, husband and wife, and Acme Meat Company, Inc., an Arizona corporation, and the separately bound Appendix thereto were mailed within the time permitted on January 19, 1984, by depositing the same in a United States post office, with first-class postage prepaid, properly addressed to the Clerk of the Court.

That three (3) copies of said Petition for Certiorari and Appendix were mailed on January 19, 1984, in the same manner, to:

The Solicitor General
Department of Justice
Washington, D. C. 20530;

That three (3) copies of said Petition and Appendix were mailed on January 19, 1984, in the same manner, to:

Glenn L. Archer, Jr.
Assistant Attorney General
Michael L. Paup
Attorney, Tax Division
Department of Justice
Washington, D. C. 20530
Attorneys for Respondents

STEPHEN E. SILVER

Subscribed and sworn to before me this 19th day of January, 1984.

Notary Public

My commission expires:

May 24, 1987